F.M. Transport, Inc. *and* United Steelworkers of America, AFL–CIO and F.M. Transport Employee Committee, Party in Interest

F.M. Transport, Inc. *and* Edward Conolly *and* Teamsters Local Union No. 124, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Cases 25–CA–17360, 25–CA–17620, and 25–CA–19246

March 28, 1991

ORDER REMANDING

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On June 12, 1989, Administrative Law Judge Thomas A. Ricci issued his decision in this proceeding in which he dismissed all of the complaint allegations. The General Counsel filed exceptions and a supporting brief, and the Respondent filed limited cross-exceptions and a brief in support of the judge's decision and in support of limited cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Order.

In an Order dated February 12, 1988, the judge granted the Respondent's motion to dismiss the complaints against it based on a theory of laches. Subsequently, on March 11, 1988, the General Counsel filed a Request for Review of the judge's Order Dismissing Complaints. On April 11, 1988, the Respondent filed an opposition to the General Counsel's Request for Review. In an Order dated April 27, 1988, the Board granted the General Counsel's Request for Review, vacated the judge's Order dismissing the complaints, and remanded the proceeding to the judge for the rescheduling of a hearing on both the merits of the complaint allegations and the due process issue. The hearing resumed in June 1988, was continued until November 29, 1988, and was closed November 30, 1988.

In his June 12, 1989 decision following that hearing, the judge dismissed the complaints, citing what he found to be unreasonable delay in prosecuting the case which, he concluded, constituted a lack of due process. In addition, the judge recommended processing an outstanding election petition which has been blocked by this proceeding. Further, although the judge made no formal finding that the Respondent had violated the Act, he recommended that if the Respondent should commit an unfair labor practice to prevent a fair election, ''the General Counsel immediately move for an interim injunction in the United States District Court to put a stop to such conduct and to guarantee to the employees their statutory rights.''

After careful review of the record, we reverse the judge's decision dismissing the complaints, and we remand this proceeding to the judge for a determination on the merits.

Although there have been numerous delays in this case, the record shows that those delays were not entirely attributable to the General Counsel. Several of the postponements resulted from the filing of new charges against the Respondent. One new charge resulted in the issuance of a new complaint alleging additional unfair labor practices by the Respondent, and another charge resulted in the General Counsel's request for a remedial order requiring the Respondent to bargain with the Steelworkers Union. On yet another occasion, there was a postponement attributable to the illness of the judge's wife. Thus, the delays were not entirely due to actions or omissions of the General Counsel.

In addition, while dismissing the complaints for lack of due process, the judge made no finding that the Respondent had been precluded in any way from presenting its defenses to the alleged unfair labor practices. In view of this, we conclude that the judge, in finding a lack of due process, again relied in the main on the delays occasioned in this proceeding or, in effect, on laches.

The Board has consistently held that the doctrine of laches is generally inapplicable to Board proceedings. See, e.g., *Auto Workers Local 248*, 149 NLRB 67, 76 fn. 12 (1964); *Burns & Gillespie*, 113 NLRB 434, 437 (1955), enf. denied on other grounds 238 F.2d 508 (8th Cir. 1956). See also *Silverman v. Commodity Futures Trading Commission*, 549 F.2d 28, 34 (7th Cir. 1977). Even in instances of unreasonable delay in the prosecution of cases before the Board, the doctrine of laches has not been applied where this would place the consequences of agency delay on wronged employees to the benefit of those who have wronged them. *Ventura Coastal Corp*., 264 NLRB 291, 297 (1982). See also *NLRB v. J. H. Rutter-Rex Mfg. Co*., 396 U.S. 258, 264–266 (1969) (delay in compliance phase of proceeding). Since, as noted above, the Respondent has merely relied on passage of time and has made no showing of prejudice such that it would not possibly receive a fair trial on the unfair labor practice charges, there is no basis for, in effect, penalizing victims of the alleged unfair labor practices simply because of the cited delay by the General Counsel.

We also do not agree with the judge that the issues will all be resolved and the representational desires of the employees satisfied by dismissal of the complaints. The dismissal did not resolve numerous complaint allegations, including allegations that the Respondent has violated Section 8(a)(3) and (1) of the Act by discrimi-

nating against employees because of their union activities. Rather, the resolution of those alleged unfair labor practices requires a weighing of the conflicting evidence presented by the General Counsel and the Respondent.

Thus, as we find that the judge incorrectly dismissed this case, we reverse the judge's decision, reinstate the complaints, and remand this case for a full determination on the merits.

ORDER

It is ordered that the Order dismissing the complaints is vacated.

IT IS FURTHER ORDERED that the proceeding is remanded to Administrative Law Judge Thomas A. Ricci who shall prepare and serve on the parties a decision containing findings of fact, conclusions of law, and recommendations based on the evidence received and that, following service of the decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Cornele A. Overstreet, Esq., for the General Counsel.
J. Charles Sheerin, Esq., of Michigan City, Indiana, for the Respondent.
George Sullivan, of East Chicago, Indiana, for the United Steelworkers of America.
Gary Proctor, of Dearborn Heights, Michigan, for Teamsters Local Union No. 124.

DECISION

STATEMENT OF THE CASE

THOMAS A. RICCI, Administrative law Judge. This case started 4 years ago, when, on July 22, 1985, the United Steelworkers of America, AFL–CIO filed a charge against F.M. Transport, Inc., a trucking company which is the Respondent here. As will be explained below, there were four hearing sessions—on April 15, and October 27, 28, and 29, 1986, and June 29 and 30, and November 29 and 30, 1988. It has been the Respondent's position, starting from January 1988, that this entire proceeding should be dismissed on the grounds of latches. With its motion to dismiss being unopposed by the General Counsel at that time, 14 months after he had insisted the case be suspended because he had other work to do, I granted the motion and dismissed the General Counsel's then multiple complaints.

After that, the General Counsel, apparently again interested in this case, requested the Board, itself, to reinstate the proceeding, and permit it to continue. By order dated April 27, 1988, the Board reinstated the two complaints and remanded the case for ''a hearing both on the merits and on the due process issue.''

The hearing was resumed on June 29, 1988. The next day the General Counsel again asked for a continuance, this time on the grounds that he had to go to the United States district court to enforce subpoenas he had served on certain employees. I granted the continuance and set August 22, 1988, as the date for continuing the hearing. Ten days before August 22, the General Counsel asked that the hearing again be put off to October 3, 1988, saying he needed more time to enforce his subpoenas. It then came to light that one of the reasons for the extreme delay between June and November 1988 was that the General Counsel had not properly served his subpoenas. In fact, his suit in the district court for subpoena enforcement was turned down. The hearing finally resumed on November 29 and was closed November 30, 1988.

While this was going on the Respondent again asked for dismissal of the entire case because of what it called ''unreasonable delay'' by the General Counsel. The contention that this proceeding should now be dismissed for lack of due process is repeated in the Respondent's posthearing brief.

All relevant factors considered, I find merit in the Respondent's contention that this proceeding should be dismissed for lack of ''due process.'' In its Order of April 27, 1988, directing that the hearing should go on, the Board expressed an interest in knowing more about the merits of Respondent's motion to dismiss. As it developed, the resumed hearing did shed more light on the events that were litigated back in 1986. I deem that added knowledge further ground supporting my original dismissal decision of February 1988. But much more supportive of the Respondent's motion now are the completely inconsistent, and, I might add, almost incoherent positions taken by the General Counsel after the Board's resumption Order.

We start at the beginning. Early in 1985 a number of the Respondent's truckdrivers signed cards for representation by the United Steelworkers of America. The first charge here was filed in July of that year by that Union. It says the Respondent had committed a number of violations of Section 8(a)(1) of the Act, and had discharged two employees—Ross and Wiltse, in violation of Section 8(a)(3). On October 3, 1985, the General Counsel issued a complaint based on that charge. It lists a number of violations of Section 8(a)(1)—interrogations, threats of plant closure, unspecified reprisals, solicitation of employee complaints, etc. The complaint also says employee Wiltse, later shown to have been a 16-year old car washer, was illegally discharged. Employee Ross is not named in the complaint, meaning that the investigation showed no improper treatment of that man by the Respondent.

The hearing was opened on April 15, 1986. When the General Counsel started by calling the president and owner of the Respondent company as his first witness, there developed a dispute whether he had been properly served with a subpoena. With the General Counsel unwilling to start proving his case by calling his own witnesses in support, the case was adjourned immediately to give him an opportunity to either go to the district court to enforce a subpoena or to probably serve one. The regular hearing did not start again until October 1986.

The testimony taken at that hearing—3 days—reveals conflicting evidence as to the 8(a)(1) witnesses and the alleged dismissal of Wiltse. It did appear clearly that Wiltse found other work about 2 months after leaving the Respondent's employ.

After almost 3 days of testimony both the General Counsel and the Charging Party then—the Steelworkers Union—finally rested their case. The Respondent then called its first witness in defense, the owner of the Company. When counsel for the Respondent passed his witness for cross-examination, the General Counsel asked for a continuance of the case

to a later date because he had other commitments he could not avoid. The Respondent wanted an early resumption to finish the litigation, but the General Counsel could not say when he would be prepared to continue. The hearing was postponed indefinitely. (It later came to light that the General Counsel, Mr. Cornele Overstreet, had been transferred from the Board's Regional Office in Indianapolis to its Regional Office in Las Vegas, Nevada.)

It was not until more than a year later, on December 21, 1987, that the General Counsel moved to reopen the hearing and to continue it.

Two realities must be seen clearly at this point. There was no refusal to bargain question raised by anyone. The Steelworkers' charge did not say there had been a demand for recognition and the resulting complaint said nothing about any 8(a)(5) violation. There was testimony about some employees having signed Steelworkers' union cards, but none were offered into evidence. And there was no reference at all either to what was the appropriate unit or the idea of majority representation. Nor was there any suggestion that a *Gissel* order, affirmatively to bargain, was warranted by the unfair labor practices alleged.

A second reality, as will appear clearly below, is that during the 1986 hearing the Respondent claimed, via cross-examination of the General Counsel's witnesses, that its employees were coerced into signing the Steelworkers' cards, with threats that if they did not, the employees of the steel mills, all members of the Steelworkers, would refuse to load their trucks when they went there on assignment. The General Counsel, at that time, scoffed at the idea.

We come to the resumed hearing a year later. At that time two more charges had been filed. On February 7, 1987, the Steelworkers filed a charge (Case 25–CA–18491), charging the Respondent with having refused to bargain in violation of Section 8(a)(5) of the Act. It was withdrawn on March 18, 1987. If there had been a demand and refusal surely George Sullivan, the Steelworkers' organizer who was a witness for the General Counsel in 1986, would have said so earlier. He was obviously making up a story and lying. That charge was undoubtedly withdrawn at the suggestion of the General Counsel himself.

In the face of such facts, when the hearing resumed in 1988, the General Counsel for the first time, 3 years after the events, asked for an affirmative bargaining order in favor of the Steelworkers.

More revealing of the abuse of due process in this case is the story about the Teamsters' Union in the picture, which came in 1988. But before getting to the final story, there is one more aspect of the Steelworkers' activity which, hard to believe, must be considered. As stated above, in 1986, the Respondent had contended that the signing of cards in favor of the Steelworkers should be ignored because the employees had been coerced and really did not want that Union as a representative. On June 28, 1988, George Sullivan, the Steelworkers' organizer, was called as a witness to support the General Counsel's request for a bargaining order in favor of his union. He said he solicited signatures from this company's truckdrivers by mail, sending them, among other things, a card to carry with them when at work. From that man's testimony:

> Q. . . . said you sent some kind of little blue card with it?
>
> A. Yeah. If it says there was a card with that there probably was, yeah.
>
> Q. And it says ''Please keep this card with you, as you may be asked for it in the mills in the near future.'' What do you have reference to there, Mr. Sullivan?
>
> A. Just exactly what it says.
>
> Q. What do you mean ''You'll be asked for this in the mills in the near future?'' What where you talking about?
>
> A. That's what I meant, I was talking you may be asked to show the card in the mill.
>
> Q. To show the card. Who would ask them to show the card?
>
> A. The loaders.
>
> Q. The loaders. Who are the loaders?
>
> A. The people that load the trucks in the mills.
>
> Q. Are they employees in the steel mills?
>
> A. They're Steelworker members.
>
> Q. Steelworker Union members. Was there some kind of communications steelwoker to union members to say—to ask drivers for these blue cards?
>
> A. No.
>
> Q. Where you thinking about instructing—
>
> A. Yes. Yes.
>
> Q. —Steelworkers to ask for those blue cards?
>
> A. Yes, we were.
>
> Q. Is that correct?
>
> A. Yes.
>
> Q. And did you later start communicating with steelworker loaders to ask for those cards?
>
> A. I don't want to answer that question, but I guess—because it involves something else other than this case.
>
> JUDGE RICCI: You know you have to speak up so you can be heard.
>
> MR. SHEERIN: I don't even know what he said and he's—The Witness. I'm considering whether I should have to answer that question or not.
>
> JUDGE RICCI: What?
>
> THE WITNESS: I don't . . .
>
> JUDGE RICCI: You're considering whether you should answer that question?
>
> THE WITNESS: Yes, I don't want to answer that question.

This was the General Counsel's own witness, whose credibility is of necessity urged by the General Counsel, admitting candidly that his method of obtaining signatures from this company's employee was pure intimidation. Could the Board conceivably order this company to recognize that union as a representative of its employees under this statute?

We come to the heart question which dictates dismissal of all the complaints in this case. Between the summer of 1985 and beginning of 1988 there does not appear to have been any activity by these employees towards representation by any union. With this proceeding having been dismissed on motion of the Respondent, unopposed by the General Counsel, the truckdrivers started signing up with Teamsters Local 124. On February 25, 1988, Local 124 filed a petition with the Board requesting an election, supported by authorization

cards signed by a majority of the employees in the bargaining unit, placed in the hands of the Board's agents. And on April 11, 1988, Local 124 filed a charge, Case 25–CA–19246, alleging that the Company had, in March, illegally discharged Carl Kelley, one of the Teamsters' agents. On April 27, 1988, the Board revitalized the complaints in this proceeding, requesting further evidence on the question of due process. With this, the Regional Office refused to hold an election and instead issued another complaint on May 24, 1988, based exclusively on the charged filed by Teamsters Local 124. This complaint, the last one involved in this proceeding, lists a series of violations of Section 8(a)(1), none of them set out in the Local 124 charge—interrogations, threats of discharge and plant closure, solicitation of grievances, promises of added benefits, etc. When the hearing was resumed, on June 28, 1988, the General Counsel opened with a statement that I should, in my eventual decision, order the Respondent to bargain now with the Steelworkers as the exclusive representative of its truckdrivers. This, before calling a single witness in support of his contention that Respondent had unlawfully interfered with its employee's right to be represented by the Teamsters. The best I can say is that I do not understand this position by the prosecution. In fact, I deem it incoherent. If an employer is under statutory obligation to bargain with union A as the exclusive representative of its employees, do those same employees, at the same time, have a statutory right, again protected by the Board's agents, to join and be represented by union B? To ask the question is to answer it.

The General Counsel called a number of witnesses to testify about having signed Teamsters' union cards, and about coercive statements made by the owner of the Company to put a stop to such activity. There was a conflict as to the latter part of that testimony. But, in my considered judgement, the critical testimony came from Gary Proctor, the Teamsters' business representative.

Testifying as a witness for the General Counsel, Proctor said he was asked by these employees to hold a meeting because they wished to join his union. The meeting was held in January 1988, where there were, according to Proctor, between 15 and 20 truckdrivers present. Insofar as this entire record shows, the number keeps changing, there were at most 22 to 24 employees in the bargaining unit however viewed. Proctor continued to say that when Local 124 filed its petition for an election, it gave the Regional Office 16 signed authorization cards in support of the petition. Again, this was the General Counsel's witness, and of course the General Counsel is bound by his direct testimony. And when, hoping to question the reliability of those cards on cross-examination of the witness, counsel for the Respondent asked the General Counsel to produce the signed cards, the General Counsel refused to produce them. There is no question about that. More than once he made that statement. ''My position is I don't believe that the cards are properly showable to Mr. Sheerin [counsel for the Respondent].''

I find it a fact, on this record, as I must, that when the Teamsters Local 124 filed its election petition in March 1988, that Union represented a majority of the employees in the appropriate bargaining unit. At the hearing Proctor said he opposed the idea of ordering this Respondent to bargain now with the Steelworkers. Asked was it his position that the Respondent should be ordered to bargain with Local 124, his answer was that he preferred to have a regular Board-conducted election to establish his Union as the proper bargaining agent. His answer pointed to the proper solution of this unreasonably protracted and useless litigation.

The most important factor to be considered is the fundamental purpose of this entire statute, to protect the right of employees to select the collective-bargaining agent of their choice. That right has at this point been denied the employees of this Company. It is time, as alleged in the successive complaints, that the Respondent, primarily through the conduct of Fred Milletich, the owner of the Company, stop its continuing efforts to prevent a fair election by intimidation, by coercive, and by illegal conduct. Were I to write the usual decision based on the long transcript of testimony I would completely discredit Milletich where he attempted to deny having committed the various violations of Section 8(a)(1) of the Act. His testimony was very unconvincing. I also believe it true, as some of the General Counsel's witnesses testified that he said he likes to have Board charges brought against him because they serve to keep putting off any election by the employees. But the truth is that the truckdrivers here never really sought representation by the Steelworkers. Instead it shows clearly a majority of them want to be represented by Teamsters Local 124. It is time to put a stop to this pointless litigation and get on with the election formally requested by the Teamsters, both when it filed its petition and as repeated by its representative at the final hearing.

I recommend that the outstanding complaints be dismissed, that the General Counsel proceed to process the Local 124 election petition, and that, in the event Milletich, or any other agent of the Respondent, hereafter in anyway commits an unfair labor practice to prevent a fair election, the General Counsel immediately move for an interim injunction in the United States district court to put a stop to such conduct and to guarantee to the employees there statutory rights.

[Recommended Order for dismissal omitted from publication.]